WILLIAM TAN GUAN HOCK

v.

KHOR CHAI HEAH

SUPREME COURT, KUALA LUMPUR
LEE HUN HOE CJ (BORNEO)
MOHD. AZMI SCJ
GUNN CHIT TUAN SCJ
[CIVIL APPEAL NO. 03-4 OF 1989]
8 FEBRUARY 1990

FAMILY LAW: *Appeal - Section 48(1)(c) Law Reform (Marriage & Divorce) Act 1976 - Application to amend 'domicile' - Whether Court has jurisdiction to hear amendment - Whether proof of domicile required when petition is presented.*

The petitioner lawfully married the respondent on 12 December 1969 by way of Chinese Customary rites and on 28 April 1987 filed for a divorce petition. Paragraph 3 of the said petition averred that "the petitioner is now domiciled in Singapore and the respondent is domiciled in Malaysia."

On 4 June 1988, by a summons-in-chambers, the petitioner sought to amend para. 3 by substituting that both petitioner and respondent are domiciled in Malaysia. The Senior Assistant Registrar allowed the amendment and the respondent appealed to the learned Judge on the following grounds:

(1) By virtue of s. 48(1)(c) of the Law Reform (Marriage and Divorce) Act 1976, the petitioner had no capacity to sue for divorce as he was domiciled in Singapore.

(2) It follows therefore that there was no cause of action and accordingly the Senior Assistant Registrar had no jurisdiction to hear the said application.

The learned Judge conceded that though s. 15(2) of Divorce and Matrimonial Procedure Rules 1980 empowers the Senior Assistant Registrar to hear the application, such an amendment must not cause any injustice that could not be compensated by cost. In this instance, the learned Judge concluded that such an amendment would be prejudicial to the respondent, in view of her application to strike out the petition since the fact of domicile would be a crucial issue. The learned Judge allowed the appeal and the petitioner (appellant) appealed.

Held:

[1] The learned Judge was correct in holding that the Senior Assistant Registrar had jurisdiction to entertain the petitioners application, however the Court disagreed with the learned Judge's finding that the amendment would prejudice the respondent.

[2] Even after the amendment, the petitioner would still have to prove and satisfy the Court that both he and the respondent were domiciled in Malaysia at the time the petition was presented, to enable the Court to exercise its powers under s. 48 of the Law Reform (Marriage & Divorce) Act 1976.

[Appeal allowed with costs.]

Cases referred to:
Nelson v. Nelson and Slinger [1958] 2 All ER 744
Wilson v. Wilson [1972] LR 2 P & D 435
Joseph Wong Lun v. Yeoh Loon Goit [1978] 1 MLJ 236
Melvin Lee Campbell v. Amy Anak Edward Sumek [1988] 2 MLJ 338
W.T. Berge v. Salamah binti Salim [1979] 1 MLJ 18
Williams & Glyn's Bank v. Astro Dinamico Cia [1984] 1 All ER 670

Legislation referred to:
Divorce and Matrimonial Proceedings Rules 1980, r. 15(2)
Law Reform (Marriage and Divorce) Act 1976, ss. 3(2), 48(1)(c)

Other source referred to:
Rayden on Divorce (14th Edn.,) at p. 56

For the appellant - Cyrus Das; M/s. Ho Thian Cheh & Co.
For the respondent - Yap Siong Cheng; M/s. Arthur Lee, Yap & Netto

JUDGMENT

Gunn Chit Tuan SCJ:

William Tan Guan Hock (the petitioner) was lawfully married to one Khor Chai Heah @ Khor Ah Chin (the respondent) on 2 December 1969, by way of Chinese customary rites in Kuala Lumpur. On 28 April 1987, he filed a divorce petition in the High Court at Johor Bahru, and in para. 3 thereof it was averred that "The petitioner is now domiciled in Singapore and the respondent is domiciled in Malaysia". But on 4 June 1988, he filed a summon-in-chambers to amend the said petition by substituting a new para. 3 therein in which it was averred that "The petitioner and the respondent are domiciled in Malaysia". The Senior Assistant Registrar allowed the petitioner's application to amend the averment in para. 3 of his petition and the respondent filed an appeal to the Judge in chambers on 16 September 1988.

Before the learned Judge Counsel for the respondent argued that para. 3 of the petition as originally filed clearly indicated that the petitioner had no capacity to sue for divorce under s. 48(1)(c) of the Law Reform (Marriage & Divorce) Act 1976, (the Act) which reads as follows:

> 48(1) Nothing in this Act shall authorise the Court to make any decree of divorce except:
>
> (a) ...
>
> (b) ...
>
> (c) where the domicile of the parties to the marriage at the time when the petition is presented is in Malaysia.

Counsel therefore contended that there was no cause of action and accordingly the Senior Assistant Registrar lacked jurisdiction when she heard application to amend the petition by way of summons-in-chambers.

Counsel for the petitioner on the other hand contended that the said s. 48(1)(c) relates to the competence of the Court to grant the relief sought and that it did not take away the Court's jurisdiction to hear the petition in the first place. The learned Judge accepted the distinction made by Counsel for the petitioner with regard to the Court's jurisdiction on the one hand and its competence to grant relief sought in the petition on the other. He was of the view that the Senior Assistant Registrar had jurisdiction to hear the application to amend the said petition in view of r. 15(2) of the Divorce and Matrimonial Proceedings Rules 1980, which is as follows:

15(2) A petition may be amended without leave before it is served but only with leave after it has been served.

But after Counsel for the petitioner had drawn his attention to *Nelson v. Nelson and Slinger* [1958] 2 All ER 744 to support his contention that an amendment of the nature sought by the petitioner should be allowed, the learned Judge stated that although there was no practice in the Divorce of the English Courts to prohibit amendment to a petition, the English Court of Appeal in that case allowed an amendment to the petition for the reason, *inter alia,* that the amendment would not cause to the wife any injustice that could not be compensated by costs. His Lordship however thought that the respondent in this case would be prejudiced by the amendment in view of her application to strike out the petition since the fact of domicile was a crucial issue and it had been averred that the petitioner was domiciled in Singapore. On that ground alone he was of the view that the Senior Assistant Registrar was wrong in allowing the application to amend the petition and accordingly allowed the respondent's appeal to him with costs, so that the petition should stand in its original form.

Before us Mr. Cyrus Das, who appeared for the petitioner, after referring to the petitioner and r. 15(2) of the Divorce and Matrimonial Proceedings Rules 1980, contended that the amendment did not prejudice the respondent. He referred to *Wilson v. Wilson* [1972] LR 2 P & D 435 and pointed out that it was held in that case that the oath of the person whose domicile was in question as to his intention to change his domicile was not conclusive, but the question for the Court was whether, upon a review of all the circumstances, it gave credit to his evidence.

Counsel also referred to *Joseph Wong Lun v. Yeoh Loon Goit* [1978] 1 MLJ 236 in which case the Singapore High Court held that clear evidence was required to establish a change of domicile. In particular, to displace a domicile of origin in favour of the domicile of choice, the standard of proof goes beyond a mere balance of probabilities. Chua J following *Wilson v. Wilson* [1972] LR 2 P & D 435, also held that the oath of the person whose domicile was in question as to his intention to change his domicile was not conclusive. The question for the Court was whether, upon a review of all the circumstances it gave credit to his evidence.

On the intention to change one's domicile of origin Counsel referred to the following s. 3(2) of the Act:

3(2) For the purpose of this Act, a person who is a citizen of Malaysia shall be deemed, until the contrary is proved, to be domiciled in Malaysia.

Reference was also made to the following passage in *Rayden on Divorce* (14th Edn.,) at p. 56:

The burden of proving that a domicile has been chosen in substitution for the domicile of origin is on the person who asserts that a domicile of choice has been acquired in place of the domicile of origin: the intention must be proved with perfect clearness.

Counsel submitted that the question of the domicile of the parties would still have to be proved when the petition is heard by the Court.

Mr. Yap Siong Cheng, Counsel for the respondent, referred to *Melvin Lee Campbell v. Amy Anak Edward Sumek* [1988] 2 MLJ 338 in which case the High Court at Kuching held, *inter alia,* that the provision of s. 48(1)(c) of the Law Reform (Marriage & Divorce) Act 1976, requires that the Court must be satisfied that at the time when the petition was presented the domicile of both the petitioners was in Malaysia. As the husband petitioner in that case had not succeeded in showing that at the time of the presentation of the joint petition his domicile was in Malaysia, the Court held that it therefore had no jurisdiction to entertain the joint petition.

Counsel also referred to *W.T. Berge v. Salamah Binte Salim* [1979] 1 MLJ 18 in which case the husband had petitioned for the dissolution of his marriage on the ground of his wife's adultery. The husband was however domiciled in Canada and the Singapore High Court held that as the husband was not domiciled in Singapore the Court had no power to grant him a decree of divorce.

In reply Mr. Das referred us to the following passage in the judgment of Lord Fraser in the House of Lords case of *Williams & Glyn's Bank v. Astro Dinamico Cia* [1984] 1 All ER 670 at 673:

> The fallacy is in confusing two different kinds of jurisdiction: the first is jurisdiction to decide the action on its merits, and the second is jurisdiction to decide whether the Court has jurisdiction of the former kind. The distinction was explained in *Wilkinson v. Barking Corp* [1948] 1 All ER 564.
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> The argument we are rejecting seems to be based on a confusion between two distinct kinds of jurisdiction. The Supreme Court may by statute lack jurisdiction to deal with a particular matter ... It has, however jurisdiction to decide whether or not it has jurisdiction to deal with such matters, ...

Counsel stated that it would be wrong to contend that the Court did not have jurisdiction to entertain any petition by virtue of s. 48(1)(c) of the Law Reform (Marriage & Divorce) Act 1976.

The question of jurisdiction however did not arise in this case because the Senior Assistant Registrar correctly considered that she had jurisdiction to entertain the petitioner's summons-in-chambers to amend his petition. The learned Judge was also correct to rule that the Senior Assistant Registrar had jurisdiction to hear the petitioner's application for amendment of his petition. But we regret that we were unable to agree with the learned Judge when he held further that the respondent would be prejudiced by the amendment of the petition in this case. Even after amendment of the petition, the petitioner would still have to prove and satisfy the Court that both he and the respondent were domiciled in Malaysia at the time when the petition was presented before the Court would exercise its powers under s. 48 of the Act to grant any relief to the parties. For the reasons stated above we therefore allowed the appeal with costs, set aside the order of the learned Judge and restored the order of the Senior Assistant Registrar in allowing the said amendment to the petition.

Also found at [1990] 1 CLJ 895